In The

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-551

JOHN BRETT ALLEN and FRANK LEWIS JACKSON,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals for the Tenth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI
### To the United States Court of Appeals for the Tenth Circuit

John Brett Allen and Frank Lewis Jackson, your petitioners, respectfully pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on April 21, 1977.

## OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on April 21, 1977, in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto. Said opinion refers to an earlier opinion involving co-defendants. That opinion is reproduced as Appendix B hereto.

On June 10, 1977, the Court of Appeals denied the petitioners' petition for rehearing and suggestion of appropriateness of rehearing en banc. (See Appendices C, D.) No opinion was written and the order has not been officially reported.

## JURISDICTION

The judgments of the United States Court of Appeals were entered on April 21, 1977 (See Appendix A.) A timely petition for rehearing with suggestions of appropriateness of rehearing en banc was denied on June 10, 1977. (See Appendix D.)

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

## QUESTION PRESENTED

Whether immunity from prosecution as provided for in Title 18, United States Code, Sections 6002 and 6003 was properly granted to the government's principal witness at the trial, notwithstanding that said witness had testified without immunity before the Federal grand jury which indicted the defendants.



## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Statute of the United States

Title 18, United States Code

**§ 6002. Immunity generally**

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information com-

pelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub. L. 91-452, Title II, § 201 (a), Oct. 15, 1970, 84 Stat. 927.

**§ 6003. Court and grand jury proceedings**

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub. L. 91-452, Title II, § 201 (a), Oct. 15, 1970, 84 Stat. 927.



## STATEMENT

Petitioners John Brett Allen and Frank Lewis Jackson were convicted by a jury in the United States District Court for the District of Colorado for violation of Title 21, United States Code, Section 972(a), conspiracy to import a Schedule I controlled substance (marijuana) (Vol. VI, p. 25). Each of the petitioners received a maximum statutory sentence, five year terms of confinement (Vol. VI, p. 38). The petitioners' direct appeal of the judgment of conviction was disposed adversely to the petitioners by the United States Court of Appeals for the Tenth Circuit on April 21, 1977 (See Appendix A).

The petitioners were indicted for conspiracy to import marijuana into the United States (Vol. VI, pp. 1-6). The conspiracy purportedly covered a six month period of time commencing in February of 1974 and ending in August of the same year.

The principal witness for the government was Michael John Venus, a unindicted co-conspirator.

Venus testified pursuant to a grant of immunity, the validity of which was disputed in the trial court (Vol. II, pp. 74-97). Venus testified to each of the overt acts alleged in the Indictment. Venus provided the only direct testimony concerning the alleged acts which constituted the purported conspiracy.

When called to the witness stand at the trial below, the witness Venus formally invoked his privilege under the Fifth Amendment of the Constitution not to testify against himself (Vol. I, pp. 60-61). Thereafter, upon application by the United States Attorney, the witness was granted immunity from prosecution (Vol. II, pp. 93-97).

At the evidentiary hearing prior to the issuance of the order, it was revealed that no formal grant of immunity was applied for or issued prior to or during his testimony before the grand jury (Vol. II, pp. 74-84). The United States Attorney testified that he had provided Venus with "informal immunity", and the Court found this to be a sufficient promise of protection (Vol. II, p. 93).

Counsel for the petitioners objected to Mr. Venus' testifying on the basis that he had waived his Fifth Amendment privilege and could not now assert it (Vol. I, pp. 61-62; Vol. II, p. 92).

## REASONS FOR GRANTING THE WRIT

It is submitted that the opinion of the Tenth Circuit conflicts with a decision rendered by the Circuit Court of Appeals for Washington, D. C., in a case styled *Ellis v. United States*, 416 F. 2d 791. It is further submitted that these petitioners present a case of first impression in regard to the granting of statutory immunity in Federal courts, in that the government utilized the device of "informal immunity" to circumvent the provisions of Title 18, United States Code, Sections 6002 and 6003.

## CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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1034 Logan Street
Denver, Colorado 80203
*Attorney for Petitioners*



## APPENDIX A

NOT FOR ROUTINE PUBLICATION

(Filed April 21, 1977)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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Nos. 75-1738 and 75-1739

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

JOHN BRETT ALLEN and
FRANK LEWIS JACKSON,
*Defendant-Appellants.*

Appeal from the United States District Court
for the District of Colorado
(D. C. No. 75-CR-58)

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Submitted: March 17, 1977

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William C. Danks, Assistant United States Attorney, (James L. Treece, United States Attorney, and Rod W. Snow, Assistant United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Joseph Saint-Veltri of Davies and Saint-Veltri, Denver, Colorado, for Defendant-Appellant Allen.

Robert S. Berger (Stuart A. Kritzer on the brief) of Davies and Saint-Veltri, Denver, Colorado, for Defendant-Appellant Jackson.

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Before LEWIS, Chief Judge, and SETH and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

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John Brett Allen (Allen) and Frank Lewis Jackson (Jackson) appeal their jury convictions and judgments of sentences on charge of conspiracy to import a controlled substance, marijuana, in violation of 21 U. S. C. A. § 952 (a). Gregory Keith Weiss and Ivan Lustig were co-conspirators. They were indicted, tried, and convicted with Allen and Jackson. Their convictions were affirmed by this court in our unpublished opinion in Nos. 75-1740 and 75-1741, filed March 22, 1977. In view of the fact that we have heretofore developed the facts and circumstances of the alleged conspiracy in detail in the Lustig and Weiss appeals (Nos. 75-1740 and 75-1741), our recital of the evidence herein will be limited to that required for the disposition of the issues presented. On appeal, we must view the evidence in the light most favorable to the Government together with all reasonable inferences to be drawn therefrom. United States v. DeLuzio, 454 F. 2d 711 (10th Cir. 1972), *cert. denied*, 407 U. S. 922 (1972).

Jackson's sole allegation of error is that the evidence, as a matter of law, is insufficient to sustain his conviction. Allen advances eight allegations of error, six of which are identical to the issues raised by, and decided adversely to, Weiss.



I.

Jackson contends that the evidence presented is, as a matter of law, insufficient to sustain his conviction. Reviewing the evidence on appeal in the light most favorable to the Government, together with all reasonable inferences to be drawn therefrom, United States v. Crocker, 510 F. 2d 1129 (10th Cir. 1975); United States v. Yates, 470 F. 2d 968 (10th Cir. 1972), we hold that there was sufficient evidence from which the jury could find Jackson guilty beyond a reasonable doubt.

The Government established that: Jackson was the co-conspirator to approach Michael Venus (Venus), concerning the possibility of his employment as a pilot to fly from the United States into Mexico and return; Jackson brought Venus to Denver, Colorado, at which time he (Venus) met with Jackson and his co-conspirators and discussed in detail his flights to Mexico in order to bring marijuana from Mexico to the United States; after Venus returned with a planeload of marijuana, Jackson departed with his co-conspirators to weigh and sell the marijuana in Aspen, Colorado. Under these circumstances the jury was fully justified in finding Jackson guilty of conspiracy to import a controlled substance.

II.

Allen advances eight allegations of error, none of which merit individual attention inasmuch as six of the issues are identical to those considered, treated and heretofore adversely decided against co-defendant Weiss. We do opt, however, to add some comment to Allen's contention that the trial court erred in allowing the United States Attorney to provide the Government's witness, Venus, with immunity.

Allen contends that "Venus waived his right to take the Fifth Amendment prior to this testimony before the grand jury which issued the indictment in this case." Allen relies on Ellis v. United States, 416 F. 2d 791 (D. C. Cir. 1969), where the court noted:

> In our view a witness who voluntarily testifies before a grand jury without invoking the privilege against self-incrimination, *of which he has been advised,* waives the privilege and may not thereafter claim it when he is called to testify as a witness at the trial on the indictment returned by the grand jury, where the witness is not the defendant, or under indictment. (Emphasis supplied.)
>
> 416 F. 2d, at 800.

The record before us establishes that Venus was not advised of his privilege against self-incrimination prior to his appearance before the grand jury. Thus, he cannot be held to have waived his privilege. The Assistant United States Attorney stated unequivocally that:

> . . . we specifically did not advise him of what we would commonly refer to as the "Miranda type" of right.
>
> [R., Vol. II, p. 77.]

A waiver of one's privilege against self-incrimination is valid only when the evidence establishes that it was a knowing, intelligent, and voluntary waiver. Boykin v. Alabama, 395 U. S. 238 (1969); United States v. McCormick, 468 F. 2d 68 (10th Cir. 1972), *cert. denied,* 410 U. S. 927 (1973); United States v. Davis, 456 F. 2d 1192 (10th Cir. 1972). *See also:* Moore v. Wolff, 495 F. 2d 35 (8th Cir. 1974) and Bursey v. United States, 466 F. 2d 1059 (9th Cir. 1972). Since Venus was not advised of his privilege against self-incrimination prior to his testimony given before the grand jury, he did not waive his right to assert the privilege during trial.

WE AFFIRM.



**APPENDIX B**

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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Nos. 75-1740 and 75-1741

---

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

vs.

IVAN LUSTIG and GREGORY KEITH WEISS,
also known as Greg Wise,

*Defendants-Appellants.*

Appeal from the United States District Court
for the District of Colorado
(D. C. No. 75-CR-58)

---

Submitted: January 28, 1977

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William C. Danks, Assistant United States Attorney, (James L. Treece, United States Attorney, and Rod W. Snow, Assistant United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Leonard M. Chesler, Denver, Colorado, for Defendant-Appellant Lustig.

Jonathan L. Olom, (Stanley H. Marks on the brief), Denver, Colorado for Defendant-Appellant Weiss.

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Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

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Gregory Keith Weiss (Weiss) and Ivan Lustig (Lustig) appeal their jury convictions of conspiracy to import a controlled substance (marijuana) in violation of 21 U. S. C. A. § 952 (a).[1] John Allen and Frank Jackson were co-conspirators who were indicted, tried, and convicted with Weiss and Lustig. They are not befo e us on appeal.

The Government developed its case around the testimony of Michael Venus (Venus), an unindicted conspirator who was afforded immunity from prosecution. Venus testified, *inter alia,* that Jackson was the first to approach him and suggest the possibility of Venus' flying into Mexico; Jackson brought Venus to Denver at which time Venus met with Allen, Jackson, Lustig and Weiss and discussed his employment as their pilot for the purpose of flying marijuana out of Mexico; Venus was to be paid $5,000 per trip; after receiving money from Allen, Venus rented an airplane; prior to departing for Mexico, Allen, Weiss and Lustig took some of the seats out of the airplane; Weiss accompanied Venus on their first trip to Mexico where they picked up 800 pounds of marijuana in small bundles; Weiss paid for the marijuana with $12,000 in cash he had previously received from Allen: Allen met

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1 Section 952 (a) provides in part:

> It shall be unlawful to import into customs territory of the United States from any place outside thereof . . . any controlled substance, . . .



them upon their return to Colorado and the marijuana was loaded into his truck; after unloading the marijuana from the airplane they flew to Boulder where they were met by Lustig; Allen, Jackson, Weiss and Lustig thereafter departed with the marijuana to weigh it and then sell it in Aspen; prior to his second flight to Mexico, Allen gave Venus $12,000 in cash to pay for the marijuana; Venus was to pick up Weiss en route but he was detained by bad weather; after picking up the second load of marijuana and while en route to Colorado, Venus was forced to land in a river bed; prior to landing in the river bed he kicked some of the marijuana sacks out of the airplane; after landing, Venus called Lustig and related his location and reported that he was out of gas; thereafter Allen arrived at the scene and Venus and Allen transferred the marijuana to a truck; and that subsequent to the flights to Mexico he (Venus) was approached and questioned by Drug Enforcement Administration (DEA) Officials at which time he decided it would be best to cooperate with them.

Other Government witnesses corroborated Venus' testimony relative to: the use of the rented airplane; phone calls placed during the delays caused by bad weather on the second trip to Mexico; the forced landing in the dry river bed; the loading of the marijuana into the truck driven by Allen; and the "ditching" of several sacks of marijuana prior to the forced landing. A chemist for the DEA laboratory testified that the plant material which he analyzed and which was admitted in evidence was marijuana.

None of the defendants testified. They called four witnesses who testified that Venus' reputation for truthfulness was bad and that he had a tendency to drink in excess.

On appeal Weiss contends that the trial court erred in: (1) failing to grant a new trial after the Government declined to disclose certain evidence about Venus; (2) refusing to grant a mistrial after Venus' unsolicited statement during cross-examination that he would be willing to take a lie detector test; (3) not granting his motion for judgment of acquittal; (4) allowing a Government chemist to testify as an expert; (5) allowing the United States to grant Venus immunity; (6) imposing a uniform sentence on each of the defendants; and (7) denying his motion for severance.

Lustig contends that: (1) he was denied effective assistance of counsel; (2) the trial court erred in ruling on his motion *in limine;* (3) he did not knowingly and intelligently waive his right to testify; and (4) and (5) the trial court erred in denying his motion for mistrial and his motion for judgment of acquittal.

I.

a.

Weiss contends that the trial court erred in not granting his motion for a new trial when it was learned that the Government had failed to make full disclosure and had withheld certain evidence concerning its chief witness, Venus. Weiss argues that the reports of the DEA agents who arrested Venus were discoverable under both the Jencks Act and the orders of the trial court.



Prior to ruling that the non-disclosure of the report did not give rise to reversible error, the trial court read the pertinent portions of the report into the record. [See Appendix I, App. 19.] Upon review of that portion of the report relative to Venus' apprehension, we hold that the Government's failure to disclose did not give rise to reversible error. In Weatherford v. Bursey, — U. S. —, 45 U. S. L. W. (February 22, 1977), at p. 4158, the Supreme Court said:

> . . . There is no general constitutional right to discovery in a criminal case and Brady did not create one; as the Court wrote recently, "The Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . .". Wardius v. Oregon, 412 U. S. 470, 474 (1973).

In upholding the trial court's refusal to grant a new trial, we reaffirm our holding in United States v. Harris, 462 F. 2d 1033 (10th Cir. 1972) as amplified in United States v. Miller, 499 F. 2d 736 (10th Cir. 1974):

> Under some circumstances, the government's suppression of beneficial impeachment evidence affecting the credibility of a key prosecution witness may result also in such unfairness as to violate due process. United States v. Harris, 462 F. 2d 1033 (10th Cir. 1972). If the prosecution's failure to produce was not deliberate, the test for reversal on appeal is whether the trial was not merely imperfect but rather "unacceptably unfair." United States v. Harris, *supra.* And where the evidence allegedly suppressed is not material to the question of the guilt or innocence of the accused but is admissible only for the purpose of attacking the credibility of a government witness, the prosecution's failure to produce must be inherently significant and favorable to the defense in order to be "unacceptably unfair." *Cf.* Link v. United States, 352

F. 2d 207 (8th Cir.), cert. denied, 383 U. S. 915, 86 S. Ct. 906, 15 L. Ed. 2d 669 (1965). The salient inquiry is whether production of the requested information might have led the jury to entertain a reasonable doubt about the defendant's guilt. *See* Kotteakos v. United States, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); Levin v. Clark, 408 F. 2d 1209 (D. C. Cir. 1967). The nondisclosure must itself be prejudicial to the defense. United States v. Brumley, *supra*.

499 F. 2d, at 744.

In view of the fact that the nondisclosure herein was not itself prejudicial to the defense, the trial court did not err in refusing to grant a new trial.

b.

Weiss contends that the trial court erred in not granting his motion for a mistrial which was made upon Venus' unsolicited statement during cross-examination that he would be willing to take a lie detector test. Venus' statement was made during the following colloquy:

> Q. Mr. Venus, would you say that your recollection of these events that you testified about has changed since they happened?
>
> A. Certainly, slightly. I would be willing to take a lie detector test.

[R., Vol. II, p. 184.]

Defense counsel objected to the response. The trial court immediately charged the jury:

> The Court: First of all, that remark is stricken, and the jury will disregard the voluntary statement about "lie detector tests," having nothing to do with it.
>
> • • •



> The Court: Ladies and gentlemen, in addition to the instructions to you that you must disregard the witness' volunteered statement about his willingness to take a lie detector test, I would advise you that the so-called lie detector test, the extent that that refers to what is also called a polygraph examination are not admissible in a Federal Court in the States; that whether or not the witness took a lie detector test, the results of it could not be considered by the jury, even if it were accomplished.

[R., Vol. II, pp. 185-186.]

At the outset we observe that the response by Venus was unsolicited and that it occurred during defense counsel's cross-examination at a time when Venus' memory and credibility were being challenged.

Weiss argues that the overwhelming adverse effect of the statement could only be negated by granting a mistrial. This bald contention is advanced without citation of authority or cogent argument. Furthermore, while he acknowledges that the trial court immediately and correctly charged the jury relative to the inadmissibility of polygraph examinations, Weiss declines to afford even token efficacy to the jury charge. We cannot endorse his position.

As we noted in United States v. Goodwin, 455 F. 2d 710 (10th Cir. 1972), *cert. denied*, 409 U. S. 859 (1972):

> . . . We find no circumstances here where striking the testimony and admonishing the jury was not sufficient to render the error harmless as considered in Lawrence v. United States, 357 F. 2d 434 (10th Cir.).
>
> 455 F. 2d, at 713.

*See also*: Tapia v. Rodriguez, 446 F. 2d 410 (10th Cir. 1971). In the absence of inadmissible evidence so prejudi-

cial that its consideration by the jury cannot be effectively withdrawn by the court, a trial judge's determination in these matters will not be disturbed. United States v. Dalzell, 442 F. 2d 1000 (10th Cir. 1971); McBride v. United States, 409 F. 2d 1046 (10th Cir. 1969), *cert. dismissed,* 396 U. S. 938 (1969).

Weiss does not attack the validity or sufficiency of the trial court's corrective admonition to the jurors that they must disregard Venus' volunteered statement relative to a lie detector test. Rather, Weiss questions the validity and efficacy of *any* curative action aside from the declaration of a mistrial. However, having opted for trial by jury, Weiss cannot, except in areas of plain error, question the ability of a properly instructed jury to fulfill its function of abiding the supervision of the trial court and in weighing the evidence in a fair and impartial manner. Donnelly v. DeChristoforo, 416 U. S. 637 (1974); Lisenba v. California, 314 U. S. 219 (1941); Young v. Anderson, 513 F. 2d 969 (10th Cir. 1975).

c.

Weiss contends that the trial court erred in not granting his motion for judgment of acquittal in view of the Government's alleged failure to establish that the marijuana contained the psychoactive agent tetrahydro-cannabinol. Weiss also contends that the Government chemist was not qualified to testify as an expert witness. Considering the evidence, as we must, in the light most favorable to the Government, United States v. Goodwin, *supra,* we hold that these contentions are individually and collectively without merit.



d.

Weiss contends that the trial court erred in affording Venus immunity. Weiss argues that since Venus testified before the grand jury, he had waived his Fifth Amendment privilege and therefore could not assert it at trial and apply for and receive immunity.

Prior to allowing the Government's request that Venus be granted immunity, the trial court observed:

> . . . [H]e was, also, at that time under the promise of a protection by the United States Attorney's office in this district that no prosecutions would be resultant from his testimony insofar as the United States Attorney's office controlled those prosecutions.
>
> I think without question, the witness is entitled to invoke the privilege at this trial.
>
> He, having done so, then the matter is simply a question of whether or not the United States wishes to grant the immunity, and as I read the Statute, 18 United States Code, Sections 6002 and 6003, it is not a matter within the discretion of the Court as to whether immunity should or should not be produced. The statute says in 6003, that where the United States Attorney makes the request with the authority of the deputy or the Attorney General, the Deputy Attorney General or a designated Assistant Attorney General, the United States District Court for the judicial district in the proceeding is held in issue, so that I don't find it discretionary with me as to whether immunity should or should not be granted.
>
> [R., Vol. II, pp. 93-94.]

We hold that the trial court properly granted the Government's motion that Venus be given immunity from prosecution in accordance with 18 U. S. C. A. § 6003. The trial court's duties in granting the requested immunity are basi-

cally confined to determining that the claim of the privilege is well founded. Namet v. United States, 373 U. S. 179 (1963); United States v. Leyva, 513 F. 2d 774 (5th Cir. 1975). In United States v. Dingle, No. 75-1943, 10th Cir., October 15, 1976, we recognized that the court may grant immunity under § 6003 before the witness takes the stand and invokes the privilege. Although Weiss questions the manner in which the immunity was granted, i. e., after Venus had testified before the grand jury, congressional concern over the process of affording immunity would appear satisfied if both the Attorney General or his designate and the United States Attorney agree on the desirability of immunity in accord with §§ 6002 and 6003 before a trial court actually grants it and if the trial court finds that the claim of the privilege is valid. Kastigar v. United States, 406 U. S. 441 (1972), rehearing denied, 408 U. S. 931 (1972); In Re DiBella, 499 F. 2d 1175 (2d Cir. 1974), *cert. denied,* 419 U. S. 1032 (1974). Section 6003 was complied with. The Court did not err in granting Venus immunity.

e.

Weiss contends that the trial court erred in imposing a uniform sentence on each of the defendants. We disagree. Absent a showing of illegality or abuse of discretion, sentences which are imposed within statutory limits will not be disturbed on appeal. United States v. McClain, 501 F. 2d 1006 (10th Cir. 1974) and cases cited therein. A review of the record satisfies us that the sentences were fully justified and well within the statutory limits. Furthermore, the trial court succinctly set forth reasons for



the sentences imposed in accordance with the mandates of Dorszynski v. United States, 418 U. S. 424 (1974):

> . . . The case is here before you as a conspiracy proven. You are all engaged in the conspiracy, and you are all equally culpable. With respect to the nature of the drug marijuana, as compared to the harder drugs, I understand the positions that you take, and what your own moral beliefs are with respect to that substance, but this is not simply a marijuana buy case; *this is a smuggling case, and this is the importation of marijuana.* (Emphasis supplied.)
>
> [R., Vol. IV, p. 494.]

In view of the similarity of participation by the defendants, which was not denied, the court's imposition of the maximum sentence upon each of the defendants was not error. This is particularly true when, as here, the protection of the public interest is necessitated by the heinous nature of the crime. This was well stated by the trial court:

> . . . And in balancing the question, as you have to do in every sentence of what is the public interest, and what is the interest of the individual defendant, in looking at it in terms of treatment and rehabilitation, I regrettably have to come to the conclusion here that the primary concern is the public interest, and that each of you should receive a sentence of punishment, and that it is a retribution sentence, and I wish to have it understood to be that.
>
> [R., Vol. IV, p. 494.]

f.

Weiss contends that the court erred in denying his motion for a severance. He acknowledges that a severance should be granted only where a defendant has clearly shown that he would be prejudiced by a joint trial. United

States v. Smaldone, 485 F. 2d 1333 (10th Cir. 1973), *cert. denied,* 416 U. S. 936 (1974). In the absence of demonstrated prejudice there is, of course, no need for severance. United States v. Mallory, 460 F. 2d 243 (10th Cir. 1972), *cert. denied,* 409 U. S. 870 (1972). In view of the overwhelming evidence presented establishing the conspiracy, coupled with the fact that none of the defendants made any showing to the trial court before or during trial demonstrating prejudice, we hold that the trial court properly denied Weiss' motion for severance. A motion for severance. A motion for severance is directed to the sound discretion of the trial court and will not be disturbed unless the discertion is abused. United States v. Davis, 436 F. 2d 679 (10th Cir. 1971).

II.

a.

Lustig contends that he was denied effective assistance of counsel. While acknowledging that the standard in this Circuit is that a defendant will be considered to have had adequate counsel unless his representation at trial is considered to be a mockery of justice and a sham, Frand v. United States, 301 F. 2d 102 (10th Cir. 1962), Lustig contends that the proper standard should be whether an accused is afforded reasonably competent representation by counsel performing at least as well as a lawyer with ordinary learning and skill in the criminal law, citing to Beasley v. United States, 491 F. 2d 687 (6th Cir. 1974), 26 A.L.R. Fed. 204, and similar cases.

Our review of the record convinces us that the trial court applied exactly the type of standard Lustig advocates. The trial court stated:



> With respect to the adequacy of Mr. Montgomery's representation, as I indicated earlier, I think the standard still in effect in this Circuit is that a defendant is adequately represented unless his trial is considered to be a mockery of justice and a sham.
>
> I don't apply that standard here, while I think that is the standard, it seems to me to be a bit outrageous to say, "Well, he did a lousy job," but it didn't amount to a mockery of justice, therefore there was adequate representation.
>
> What I did find from the review of the — of my recollection of the trial is that the representation was adequate by any community standards that could be applied to it, and that Mr. Montgomery fought the fight for his client throughout this trial, . . .
>
> [R., Vol. IV, p. 485.]

We have reviewed the record in its entirety. We hold that the trial court properly found that Lustig was afforded effective assistance of counsel.

b.

Lustig contends that the trial court erred in not making a timely ruling on his motion *in limine* to exclude evidence of or cross-examination of him concerning a guilty plea he had previously entered. Lustig further contends that he did not knowingly and intelligently waive his constitutional right to testify.

Although we treat all contentions on appeal as being advanced in good faith, until the opposite is shown, a review of the record on this point does arouse serious doubts relative to the sincerity with which the above two contentions are made, evidenced by this trial colloquy:

> The Court: One other thing I wanted to deal with earlier, before we recessed, and I want to deal with it

now, is the motion *in limine* filed on behalf — by Mr. Montgomery on behalf of Mr. Lustig.

Mr. Montgomery: Your Honor, please the Court, I possibly could save time.

The Court: All right.

Mr. Montgomery: I have talked with Mr. Lustig and he indicates that he prefers not to take the stand, and therefore, the motions are moot.

The Court: All right.

[R., Vol. III, pp. 312-313.]

Obviously, having declared his motions "moot" Lustig left nothing for the trial court to rule on or dispose of. Beyond this fact, our review of the evidence in the light most favorable to the Government, clearly evidences that Lustig knowingly and intelligently waived his right to testify.

c.

We have carefully considered Lustig's other allegations of error. We hold them to be singularly and collectively without merit.

WE AFFIRM.

## APPENDIX I

The Court: This first page, is that the only part that relates to this incident?

Mr. Henry: Yes, Your Honor. That's the only paragraph that relates to that. That was the only contact that they had in relation to the cooperation was when it came from Mr. Dale Johnson, and Mr. Dale Johnson testified to that—or didn't testify or made recommendations to the Court.



The Court: All right.

I will read this into the record (reading):

"On August 29th, 1974, at about 1:30 A. M. Michael J. Venus registered at Rodeway Inn Motel, Boulder, Colorado.

"Shortly thereafter officers of the Boulder Police Department arrested Venus at the hotel on an outstanding traffic warrant. At about 4:30 A. M. that same date Detective Dwayne Gross and Sergeant Greco from the Boulder Police Department arrested Venus at the Rodeway Inn on an outstanding traffic warrant. While at the Boulder Police Department, Venus was questioned, after being advised of his rights, regarding his activities for the past several weeks, and, also, regarding the aircraft on the Shoemaker Ranch at Wiggins, Colorado.

"Venus refused to make any statement, and that prior to cooperating with the agents, he wished to confer with his attorney. At the time of his arrest, Venus did not have any funds on his person.

"On August the 29th, 1974, Acting Group Supervisor Smith received a telephone call from Mr. Dale Johnson, attorney, who stated he was representing Venus on the traffic arrest.

"Mr. Johnson inquired as to our interest in Venus and wanted to know if we were considering filing any charges.

"Acting Group Supervisor Smith advised Mr. Johnson briefly of the facts concerning this investigation, and that we were interested in soliciting Venus' cooperation.

"Mr. Johnson then stated that if we would grant Venus immunity, he would advise Venus to cooperate before the U. S. Grand Jury.

"Acting Supervisor Smith advised Mr. Johnson that U. S. Attorney Terry Wiggins could be contacted about granting the immunity to Venus."

That appears to be the pertinent portions of this document. [R., Vol. IV, pp. 474-476.]

## APPENDIX C

In The United States Court of Appeals
For The Tenth Circuit

No. 75-1738,
No. 75-1739,
No. 75-1740,
No. 75-1741

UNITED STATES OF AMERICA,

*Appellee,*

vs.

JOHN BRETT ALLEN, also known as Dennis Dene Barrett,
FRANK LEWIS JACKSON,
IVAN LUSTIG,
GREGORY KEITH WEISS, also known as Greg Wise,

*Appellants.*

Appeal From the United States District Court
For the District of Colorado

PETITION FOR REHEARING

JOSEPH SAINT-VELTRI
DAVIES AND SAINT-VELTRI

1034 Logan Street
Denver, Colorado 80203
Telephone: 832-2312

*Attorney for Defendant-Appellant John Brett Allen*



COMES NOW the Defendant-Appellant John Brett Allen, by and through his attorney, Joseph Saint-Veltri of the law firm of Davies and Saint-Veltri, and he moves this Honorable Court for the entry of an Order granting him a rehearing in the above-captioned matter.

As grounds for this Petition, he states and alleges as follows:

1. That on April 21, 1977, this Honorable Court issued its Opinion in the case styled United States of America, Plaintiff-Appellee, vs. John Brett Allen and Frank Lewis Jackson, Defendants-Appellants.

2. That said Opinion affirmed the conviction of the Defendant-Appellant John Brett Allen.

3. That part II of said Opinion resolves the issues of "Allen's contention that the trial court erred in allowing the United States Attorney to provide the government's witness, Venus, with immunity." (p. 3, OPINION.)

4. That this Honorable Court held "The record before us establishes that Venus was not advised of his privilege against self-incrimination prior to his appearance before the grand jury. Thus, he cannot be held to have waived his privilege." ". . ., he did not waive his right to assert the privilege during trial." (p. 4, OPINION.)

5. That the Court's resolution of Defendant-Appellant Allen's contention as heretofore outlined, that is on the basis that having not been advised of his constitutional privilege against self-incrimination prior to his appearance before the grand jury, the witness did not waive it, thus

enabling him to assert it as a basis for immunity during trial, was never briefed by either the government or the Defendant-Appellant and was never argued by either side during oral argument. Indeed, the government's position as elucidated in their brief is antipodal to this Court's Opinion.

In its Opening Brief, the government asserts:

> "The important facts are that Venus was 'fully aware of the rights and the protections granted to him by the Constitution of the United States at the time he was interviewed, and at the time he gave testimony before the grand jury, he was, also, at that time, under the promise of a protection by the United States Attorney's Office in this district that no prosecutions would be resultant from his testimony insofar as the United States Attorney's Office controlled those prosecutions.' "
> (p. 14, GOVERNMENT'S BRIEF)

6. Hence, it is submitted that the trial court and the United States Government have taken a position contradictory to the Opinion of this Honorable Court.

7. That the langauge contained in the Government's Brief as quoted in paragraph 5 of this Petition is a rendition of a trial court finding of fact which this Honorable Court has not taken into account in its Opinion, and further, constitutes a confession by the government that the witness, Venus, was, in fact, advised and aware of his privilege against self-incrimination before he appeared before the grand jury.

8. That in regard to the issue of witness immunity, this Court's Opinion in the Lustig-Weiss case is inconsistent with this Court's Opinion in the Allen-Jackson case



in that portions of the record quoted on page 9 of the Opinion assumed that the witness Venus had waived his privilege against self-incrimination prior to testifying before the grand jury. This assumption is warranted by the "pertinent portions of the report" which are found in Appendix I, page 15: " 'While at the Boulder Police Department, Venus was questioned, *after being advised of his rights,* regarding his activities for the past several weeks, and, also, regarding the aircraft on the Shoemaker Ranch at Wiggins, Colorado.' " (Emphasis supplied.)

9. It is further submitted that since the grounds relied upon by this Honorable Court in their Opinion were not briefed or argued by either side, this Court has not had the opportunity to consider whether the government acted improperly; in that the record, portions of which have been abstracted and attached hereto as an appendix, support the conclusion that the government, the witness and counsel for the witness entered into an arrangement which tainted not only the witness' grand jury testimony but also his position as a potential recipient of statutory immunity.

10. That in addition to the utilization of a calculated device by the government in arranging a "promise of protection," the existence of the "promise of protection" demonstrates that the witness, Venus, was aware of his privilege against self-incrimination prior to the time that he testified before the grand jury. This assertion is bolstered by the facts that the witness, Venus, was represented by counsel throughout his negotiations with the United States Government and by the language quoted in paragraph 8 which originates from Appendix I, p. 15 of the Lustig-Weiss Opinion.

11. That in section VI (c) of the Defendant-Appellant's Opening Brief, he addresses himself to the issue of whether or not the "Court abused its discretion in not allowing counsel to read the presentence reports compiled in regard to the defendant" and in VII of the Answer Brief of the government, the government addressed itself to the identical issue.

12. That this Honorable Court, in its Opinion in both the cases styled United States of America, Plaintiff-Appellee, v. Ivan Lustig and Gregory Keith Weiss aka Greg Wise, Defendants-Appellants, and United States of America, Plaintiff-Appellee, v. John Brett Allen and Frank Lewis Jackson, Defendants-Appellants, both bearing Criminal Action Nos. 75-1738 and 75-1739, does not mention, consider, or resolve the issue elucidated in the foregoing paragraph.

13. That upon best information and belief, the issue stated in paragraph X is significant on the grounds alleged in the Defendant-Appellant's Opening Brief and the fact that each of the defendants was a first offender who received a maximum statutory sentence.

14. That the need for access to the presentence report is enhanced by what this Court has characterized as "the heinous nature of the crime." (p. 11 Lustig-Weiss OPINION.)

WHEREFORE, the Defendant-Appellant prays that this Honorable Court enter an Order granting him a rehearing, and further suggests unto this Honorable Court that the rehearing be conducted en banc.



Respectfully submitted,

/s/ Joseph Saint-Veltri
Davies and Saint-Veltri

1034 Logan Street
Denver, Colorado 80203
Telephone: 832-2312

Attorney for Defendant-
Appellant, John Brett Allen

**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing Petition for Rehearing by personally delivering same to the office of the United States Attorney, 323 United States Courthouse, Denver, Colorado, on the 1st day of June, 1977.

/s/ Brandie Frank

**APPENDIX**

*Cross-Examination*

BY MR. SAINT-VELTRI:

Q. Mr. Fisher, would I be correct in understanding that Mr. Venus was called before a Federal Grand Jury on November the 7th of 1974?

A. Yes; that's correct.

Q. And you were conducting that Grand Jury on behalf of the United States Attorney's office at that time; is that correct?

A. Yes.

Q. And is it your statement or your testimony now up to this point in time, Mr. Venus had not been advised of the so-called "Miranda" rights by either you or by anyone in the Drug Enforcement Administration?

A. I can only speak for myself, for myself and for agents in my presence; that's correct, as to that. He was not advised of "Miranda."

Q. What was your impression that Mr. Venus had been advised by his private counsel, Mr. Johnson, concerning specifically his Fifth Amendment privilege not to incriminate himself?

A. It would be surmise on my part but I would imagine that a lawyer of Mr. Johnson's ability would have discussions with his client concerning this.

Q. Did you have any impression, particular impression or distinctive impression that this had occurred by anything Mr. Venus said or anything that was said by his attorney, Mr. Johnson?

A. There is nothing that they brought it up in the conversations other than the things I mentioned to you. That is what Mr. Johnson said to Mr. Venus, I don't know.

Q. During the contact in the early part of November with Mr. Venus, did he appear to be alert and competent to understand what was going on?

A. Yes.

Q. Did he seem to understand the nature of the bargains that were being struck at that time.

A. Yes.



Q. Nothing to indicate that he did not or was unable to understand if advised what his personal rights might have been?

A. There was nothing to indicate that he was anything but alert when I talked to him.

Q. Do you know whether or not the DEA or any agent thereof had contact with Mr. Venus prior to your being contacted by Mr. Johnson on approximately the first part of November?

A. I don't recall the exact chronology at that time. I am not certain who made the first contact.

Q. Was Mr. Venus ever arrested by any agent of the Drug Enforcement Administration, to your knowledge?

A. I don't recall. I don't believe so, although I can't be sure.

Q. It is your testimony that the rationale of not advising Mr. Venus either at the time of the interview or at the time he testified before the Grand Jury, was a device to protect Mr. Venus from later being precluded from applying for immunity; is that correct?

A. It was simply a device between — that Mr. Johnson and I discussed and decided to use to protect Mr. Venus in the event someone did contemplate prosecuting him for those statements.

Q. A notion being that since he was not advised by you at the time of the Grand Jury hearing that the Grand Jury responses made by Mr. Venus would not be admissible against him?

A. In a "Miranda" sense, yes.

Q. And this was done in conjunction with an informal agreement between you and Mr. Johnson in the nature of a promise not to prosecute?

A. That's right.

Q. And I assume that that promise not to prosecute did not emanate from any statutory authority or any judicial authority?

A. Well, it certainly didn't arise from any judicial authority, and insofar as — let us say — that was not a Court Order type of thing, so the authority would be the authority of a prosecutor, part of the Executive Branch of the Government. That would be the authority.

Q. A promise by a prosecutor not to prosecute?

A. That's right.

(TRANSCRIPT VOL. II, pp. 78-80)

**APPENDIX D**

MAY TERM—JUNE 10, 1977

Before Honorable David T. Lewis, Chief Judge,
Honorable Oliver Seth, Circuit Judge,
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge,
Honorable James E. Barrett, Circuit Judge, and
Honorable William E. Doyle, Circuit Judge.



No. 75-1738

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

JOHN BRETT ALLEN,
aka Dennis Dene Barrett,
*Defendant-Appellant.*

No. 75-1739

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

FRANK LEWIS JACKSON,
*Defendant-Appellant.*

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing en banc.

Upon consideration whereof, the petitions for rehearing are denied by Chief Judge Lewis and Circuit Judges Seth and Barrett to whom the cases were argued and submitted.

The petitions for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied.

A true copy.

/s/ HOWARD K. PHILLIPS
*Clerk*

Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit
/s/ CHERI BASSIO
Deputy Clerk